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~~No. 02-1516~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, Individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, Individually and in their ofiicial capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF CHAIM BOOK, YOSIFA BOOK AND STEPHEN BRENNER

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14pp

TABLE OF CONTENTS

Page

STATEMENT 1

REASONS TO DENY THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE MEANING OF "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND, IN ANY EVENT, THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE 5

II. LAWS THAT DISCRIMINATE AGAINST RELIGIOUS CONDUCT ARE UNCONSTITUTIONAL REGARDLESS OF THEIR IMPACT 7

III. SINCE ACCEPTANCE OF AN ERUV DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, IT DOES NOT JUSTIFY THE DISCRIMINATORY DEMAND THAT THE ERUV BE REMOVED 9

IV. THE DECISION BELOW IS NOT A FINAL JUDGMENT 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES ***Page(s)***

ACLU of New Jersey v. City of Long Branch, 670 F. Supp.1293 (D.N.J. 1987) 9

Brotherhood of Locomotive Firemen v. Gangor & Aroostock R. Co., 389 U.S. 327, 328 (1967).....10

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....4, 6, 7, 8

Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).....6, 7

Fraternal Order of Police Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) 4

Good News Club v. Milford Cent. School, 533 U.S. 98 (2001) 8

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1986) 4

Smith v. Community Bd. No. 14, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd*, 518 N.Y.S.2d 356 (2d Dep't 1987) 9

United States v. Virginia, 518 U.S. 515 (1996) 10

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 10

OTHER AUTHORITIES

ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 10

STATEMENT

This case concerns the refusal by the Borough of Tenafly to allow its Orthodox Jewish residents to attach to telephone poles 183 plastic strips that are identical in appearance to the coverings on ordinary ground wires affixed to utility poles throughout the Borough. The plastic strips (called *lechis* in Hebrew) are components of an *eruv* – a ceremonial demarcation of an area within which Orthodox Jews are permitted to carry and to push carriages, strollers and wheelchairs on the Sabbath and on Yom Kippur. "Without an *eruv* Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath." Pet. App. 4a.

Orthodox Jewish communities in dozens of metropolitan districts in the United States, including Washington, D.C., have obtained from local governments the ceremonial proclamation required by Jewish Ritual Law for the creation of an *eruv* and permission to affix to utility poles similar strips of plastic, wood or other material. In Tenafly, however, the request aroused significant resistance from the Mayor, some members of the Borough Council, and various Tenafly residents.

At a public meeting of the Borough Council held in July 1999, vehement objections to a potential *eruv* were expressed by residents who did not want Orthodox Jews to move into the neighborhood. Pet. App. 5a-6a; 73a-84a. Although the Borough's Attorney was present at the meeting, neither he nor any other speaker mentioned Ordinance 691. That provision was first invoked in late 2000, after the plastic strips for the *eruv* had been attached to

telephone poles with the permission of Verizon, the local telephone company that owned the poles, and with the assistance of Cablevision, a company that has provided personnel to assist in creating an *eruv* in various other communities in the United States.

In response to a formal application, filed by the respondents in November 2000, to retain the plastic strips that comprise the *eruv,* the Tenafly Borough Council held two public hearings during which proponents and opponents of the *eruv* spoke. During the meeting of December 12, 2000, a Councilman noted that "no ordinance, no resolution . . . says that you cannot hang something from a utility pole." Pet. App. 8a-9a.

The Council voted 5-to-0 to order removal of the *eruv* on December 13, 2000, and this injunction action was instituted two days thereafter. A four-day evidentiary hearing on the respondents' motion for a preliminary injunction was held in April and May 2001. The principal subject explored at the hearing was the motivation of the members of the Council who voted to deny permission for the *eruv.* Evidence was also introduced regarding Tenafly's enforcement of Ordinance 691. The court of appeals summarized the enforcement record as follows (Pet. App. 2a-3a):

> Although Ordinance 691 does not allow Borough officials to make exceptions on a case-by-case basis, in practice they have often done so. House number signs nailed to utility poles in plain view are frequently left in place. Local churches are tacitly

> allowed to post permanent directional signs bearing crosses on municipal property. Lost animal signs and other private postings often remain undisturbed by Borough officials. Orange ribbons were affixed to utility poles "for a lengthy period of time" by supporters of the local high school during a protracted controversy over school regionalization, but Borough officials made no effort to remove them. Every year, officials in the small community permit the local Chamber of Commerce to affix holiday displays to the Borough's utility poles for approximately six weeks during the Christmas holiday season. Red ribbons, wreaths, and seasonal holiday lights are attached to the Borough's utility poles as part of these displays.

The district court concluded that while several of the members of the Borough Council voted to deny the respondents' application "because of the perceived divisiveness and exclusivity that an *eruv* would generate in Tenafly," their votes were "not affected in any way by any animosity or prejudice against Orthodox Judaism." Pet. App. 147a. The district court held that Ordinance 691 was "a reasonable, facially neutral restriction on access to the right-of-way, that as applied did not have the effect of discriminating against [the respondents'] viewpoint." Pet. App. 141a-142a. Accordingly, the district court denied respondents' motion for a preliminary injunction against removal of the *eruv*.

The court of appeals reversed and directed the entry of a preliminary injunction. The court held "that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of" this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), and the Third Circuit's decision in *Fraternal Order of Police Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d Cir. 1999). The court said (Pet. App. 36a):

> Apart from their religious nature, the *lechis* are comparable to the postings the Borough has left in place. If anything, the *lechis* are less of a problem because they are so unobtrusive; even observant Jews are often unable to distinguish them from ordinary utility wires.

On this basis, the court evaluated Tenafly's order directing removal of the *eruv* under the "strict scrutiny" standard. It rejected Tenafly's reliance on *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1986), on the ground that respondents were "not asking for preferential treatment" but only to have religious observance treated equally with secularly motivated conduct. Pet. App. 38a-40a. The court of appeals also rejected Tenafly's claim that removal of the *eruv* would not "substantially burden" the respondents' religious observance. The court said: "Under *Smith* and *Lukumi,* however, there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. And the court of appeals held that it would be impermissible to distinguish, as Tenafly

had argued, between "mandatory" and "optional" religious practices. Pet. App. 43a-45a.

Finally, the court of appeals held that Tenafly could not constitutionally justify prohibition of the *eruv* on the ground that permitting the *eruv* would appear to be an endorsement of Orthodox Judaism in violation of the Establishment Clause. The court said: "[B]ecause the *eruv* is maintained solely with private funds and because allowing the *lechis* to remain in place would represent neutral rather than preferential treatment of religiously motivated conduct, no reasonable informed observer would believe the Borough is 'affirmatively sponsor[ing]' an Orthodox Jewish practice." Pet. App. 56a.

REASONS TO DENY THE WRIT

I

THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE MEANING OF "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND, IN ANY EVENT, THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE

The Third Circuit's careful opinion, which rejected various constitutional and statutory claims made by the respondents (see Pet. App. 15a-16a n.13; 16a-30a) while upholding their Free Exercise of Religion claim, was based on a painstaking examination of the record and is obviously very fact-specific. The court of appeals held that *on the record made in this case* Tenafly's order to remove the 183

plastic strips that comprise the *eruv* amounted to the kind of "selective, discretionary application of Ordinance 691" that violated the standard articulated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

In their effort to convert this narrow ruling into a decision that would warrant certiorari, the petitioners have seized on language in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), that described the unemployment-compensation cases in which this Court, before the *Smith* decision, had sustained claims under the Free Exercise Clause of the First Amendment. The Court said in *Smith* that the unemployment-compensation cases were instances in which the law prescribed "a system of individual exemptions" and that "system" had not included "religious hardship." 494 U.S. at 884.

This description of a particular string of decisions of this Court did not create a doctrinal category for the determination of future cases. This Court did not say in its *Smith* opinion that only if there is "a system of individual exemptions" can a First Amendment claim be sustained. The petitioners' effort to convert descriptive language in *Smith* into a doctrine over which the federal courts of appeals differ (Pet. 10-18) is made of whole cloth. The court of appeals did not invoke the term "system of individual exemptions" anywhere in its opinion. It made no reference to any split among the circuits over such a doctrine. Other than in the petition for certiorari in this case – authored by professors of law at two New York law schools – there has been no recognition heretofore of any constitutional issue that turns on a "system of individual exemptions."

Moreover, this case does not involve any "system of individual exemptions." Tenafly's position in the courts below was that it granted no exemptions whatever, not that the law authorized "individual exemptions." Brief for Appellees, 3d Cir., No. 01-3301, p. 49. The record of this case establishes that Ordinance 691 was totally ignored during the first year-and-a-half of the controversy over the Tenafly *eruv*. It was discovered as an afterthought and used by the Tenafly Borough Council, in December 2000, as a convenient pretext for demanding that the otherwise unobtrusive plastic strips be removed. The court of appeals' decision was based on a history of extensive nonenforcement of Ordinance 691 in contexts other than the use of telephone poles for the benefit of the Orthodox Jewish residents. See the recitation quoted at pp. 2-3, *supra*. Pet. App. 3a. Hence the primary "Question Presented" in the petition is not actually presented by the facts of this case or by the opinion of the court below.

II

LAWS THAT DISCRIMINATE AGAINST RELIGIOUS CONDUCT ARE UNCONSTITUTIONAL REGARDLESS OF THEIR IMPACT

There is no conflict among the federal courts of appeal over the primary proposition expressed by the Third Circuit – *i.e.* that "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. The Third Circuit went on to disapprove of the approach of some

courts of appeals that *have* inquired into the "centrality of religious practices" (Pet. App. 42a n.31) in cases that did not involve discrimination against religiously motivated conduct. The petitioners assert that these courts would require proof of a substantial burden "even where *Lukumi* applies." Pet. 22. But no reported decision other than the Third Circuit's ruling in this case has addressed that question.

Moreover, the Third Circuit is plainly correct in its reading of the *Lukumi* decision, which did not turn on proof of a "substantial burden." This Court's subsequent decision in *Good News Club v. Milford Cent. School,* 533 U.S. 98 (2001), confirmed the principle that discrimination against religious conduct is constitutionally prohibited even without proof that religious observance has been "substantially burdened."

Finally, if "substantial burden" did have to be shown, the undisputed fact that removal of the *eruv* prevents "Orthodox Jews who have small children or are disabled . . . [from] attend[ing] synagogue on the Sabbath" (Pet. App. 4a) surely satisfies that standard.

III

SINCE ACCEPTANCE OF AN *ERUV* DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, IT DOES NOT JUSTIFY THE DISCRIMINATORY DEMAND THAT THE *ERUV* BE REMOVED

Petitioners' final claim is that this case raises the issue whether apprehension of an Establishment Clause violation is a compelling interest that justifies a municipality's restriction on a religious observance. It was undisputed in the district court, however, that by permitting Orthodox Jews to maintain an *eruv* at no public expense, a local government does not violate the Establishment Clause. *ACLU of New Jersey v. City of Long Branch,* 670 F. Supp. 1293 (D.N.J. 1987); *Smith v. Community Bd. No. 14,* 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd,* 518 N.Y.S.2d 356 (2d Dep't 1987); see Pet. App. 124a. Tenafly never claimed prior to the district court decision that permitting the *eruv* would be unconstitutional. Hence the alleged "split between the circuits" over this issue (Pet. 24-27) is not presented by the record of this case.

IV

THE DECISION BELOW IS NOT A FINAL JUDGMENT

A final prudential reason to deny the petition for a writ of certiorari in this case is that the ruling below resolved only the question whether a preliminary injunction should issue. This Court ordinarily reviews final judgments and

does not ordinarily consider issues presented at an interlocutory stage of federal litigation. See *Brotherhood of Locomotive Firemen v. Gangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); *United States v. Virginia*, 518 U.S. 515 (1996); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Robert L. Stern, et al.*, Supreme Court Practice, pp. 258-261 (8th Ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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